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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 DOUGLAS P. ELLIOT,

12 Petitioner,

13 vs.

14 ROBERT J. HERNANDEZ, Warden,

15 Respondent.
16

Civil No. 07cv0535-L (JMA)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

17 Petitioner, a state prisoner proceeding pro se, has submitted a document which has been
18 docketed as a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, but wherein
19 Petitioner merely states that he is in the process of preparing a federal habeas petition and
20 requests an extension of time in which to file his petition.

21 **FAILURE TO FILE PETITION**

22 Petitioner has not filed a Petition for writ of habeas corpus in this action. Therefore,
23 unless Petitioner is a capital prisoner, he has not initiated habeas proceedings in this Court.
24 Calderon (Nicolaus) v. United States District Court, 98 F.3d 1102, 1107 n. 3 (9th Cir. 1996)
25 (“Unlike non-capital prisoner who initiate habeas proceedings by filing a petition for a writ of
26 habeas corpus, capital prisoners commence federal habeas proceedings by filing a request for
27 appointment of counsel.”); McFarland v. Scott, 512 U.S. 849 (1994).

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1 Petitioner does not contend that he is a capital prisoner, that is, a prisoner under sentence
2 of death, and there is nothing in the documents he has submitted which indicates that he is a
3 capital prisoner. If Petitioner wishes to proceed with a habeas action in this Court he must (as
4 is the case with all non-capital prisoners) file a petition for writ of habeas corpus, which will be
5 given a separate civil case number. However, if Petitioner is in fact a capital prisoner, he may
6 request the Court to re-open this action in order to permit him to file a Petition under the civil
7 case number assigned to this action.

8 The Court notes that Petitioner filed a habeas petition several days after filing the instant
9 request. That petition was transferred from this Court to the Central District of California on
10 March 27, 2007. (See Docket No. 3 in So. Dist. CA Civil Case No. 07cv0550.) The dismissal
11 of this action is without prejudice to Petitioner to seek the requested relief in the Central District.

12 **CONCLUSION AND ORDER**

13 This action is **DISMISSED** without prejudice because Petitioner has not filed a Petition and has
14 therefore failed to initiate federal habeas proceedings in this action. If Petitioner is a capital prisoner
15 he may request to have this case reopened.

16 **IT IS SO ORDERED.**

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18 DATED: March 29, 2007

19 
20 M. James Lorenz
United States District Court Judge

21 CC: ALL PARTIES
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